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CONTRACTS—IMPLIED ASSUMPTION OF CONTINUED EXISTENCE OF BUILDING—RECOVERY FOR PART PERFORMANCE.—Action to recover the balance of contract price under a contract to “furnish, fabricate, and erect” two large steel storage tanks in defendant’s building, and to make certain alterations in the building necessary for the installation of the tanks. Payment was to be made after each tank was completed, tested, and accepted. After the tanks were partially erected, an explosion and fire destroyed the building, making further performance impossible; thus, without fault of either party, the uncompleted tanks and other materials brought onto the premises but not yet incorporated into the tanks were destroyed. Plaintiff relies especially on a provision of the contract that “it is further agreed that no . . . injury to or loss or destruction of said property shall release the buyer from his obligation hereunder.” Held, destruction of the building released both parties from their obligations under the contract and each party was left to bear its own loss.¹

A contract to erect an entire building is not discharged by destruction after part performance; the risk is on the contractor and he has the duty to rebuild.² On the other hand, where a contract provides for work to be done on an existing building, as by repairs or installation of fixtures, the contract is made on a mutual assumption that the building will continue in existence;

¹³ Putman v. Producers Live Stock Marketing Assoc. (1934), 256 Ky. 196, 75 S. W. (2d) 1075. Third doctrine also upheld in Jones v. Manhattan Horse Manure Co. (1919), 91 N. J. L. 406, 103 A. 984; Cudney v. R. B. Phillips Mfg. Co. (1917), 181 App. Div. 257, 168 N. Y. S. 268; Willis v. Wylls Corp. (1922), 98 N. J. L. 180, 119 A. 24; Southwell v. Parker Plow Co. (1926), 234 Mich. 292, 207 N. W. 872; Davis v. Englestein (1932), 263 Ill. App. 57.

¹⁴ Supra, note 7. Speeder Cycle Co. v. Teeter.

¹⁵ Willis, Introduction to Anglo-American Law, p. 13.

¹⁶ Problem discussed in this note also discussed by Hardman, Contracts of Agency Without Stipulations as to Duration, 35 West Virginia L. Q. 116.

¹ Rossville Alcohol and Chemical Corporation v. Steel Const. Co. (Ind. App. 1937), 8 N. E. (2d) 1016.

² School District v. Dauchy (1856), 25 Conn. 530; Prather v. Latshaw (1919), 188 Ind. 204, 122 N. E. 721.

its accidental destruction operates as an implied casual condition subsequent to release both parties from further obligations under the contract.³ As to these two propositions, the authorities are in accord. A clear break in authorities is found on the question of the right of the contractor, thus discharged from the duty of further performance on a contract to work on an existing building, to recover for part performance prior to the destruction. It is held in England and in several American states that all rights and liabilities are discharged and that the law will aid neither party, leaving each to bear its loss as it fell.⁴ The majority of the states, however, permit recovery in one form or another: recovery *pro tanto* by treating the contract as divisible upon destruction;⁵ recovery in quasi-contract for benefits conferred;⁶ recovery quantum meruit presumptively at the contract rate;⁷ recovery allowed, but decision ambiguous as to the standard employed.⁸

The problem involved is an apportionment of loss between two innocent parties, and it is not surprising that the various courts have taken different views as to what is a fair and reasonable solution. The contractor has expended time and money upon the owner's property and presents a strong argument for compensation; on the other hand, it seems a considerable burden to force the owner to pay for work which never reached a stage where he could make use of it. The cases which deny any recovery purport to appor-

³ See cases cited below, notes 4, 5, 6, 7, and 8.

⁴ *Krause v. Board of Trustees of Crothersville* (1904), 162 Ind. 278, 70 N. E. 264, 65 L. R. A. 111, 102 Am. St. Rep. 203, 1 Ann. Cas. 460; *Appleby v. Myers* (1867), L. R., 2 C. P. 650; *Anglo-Egyptian Nav. Co. v. Rennie* (1875), L. R., 10 C. P. 271; *Charrette-Kirk Co. v. McKittrick* (1912), 3 W. W. R. 448, 22 W. L. R. 711, 22 Man. R. 724, 8 D. L. R. 365; *Clark v. Collier* (1893), 100 Cal. 256, 34 P. 677; *Taulbee v. McCarty* (1911), 144 Ky. 199, 137 S. W. 1045; *Louisville Foundry etc. Co. v. Patterson* (1906), 29 Ky. Law. Rep. 349, 93 S. W. 22; *Brumby v. Smith* (1841), 3 Ala. 123; *Siegel, Cooper, & Co. v. Eaton and Prince Co.* (1895), 165 Ill. 550, 46 N. E. 449; *Huyett Mfg. Co. v. Chicago Edison Co.* (1897), 167 Ill. 233, 47 N. E. 384.

⁵ *Hollis v. Chapman* (1871), 36 Tex. 1; *Weis v. Devlin* (1887), 67 Tex. 507, 3 S. W. 726, 60 Am. Rep. 765; *Schwartz v. Saunders* (1867), 46 Ill. 18; *Dolan v. Rogers* (1896), 149 N. Y. 489, 44 N. E. 167; *Hysell v. Sterling Coal & Mfg. Co.* (1899), 46 W. Va. 158, 33 S. E. 95; *Bailey v. Brown* (1895), 9 Ohio Cir. Ct. 455, 6 Ohio Cir. Dec. 440; *Ganong & Chenoweth v. Brown* (1907), 88 Miss. 53, 40 So. 556, 117 Am. St. Rep. 731; *Halsey v. Waukesha Springs Sanitarium Co.* (1905), 125 Wis. 311, 104 N. W. 94, 110 Am. St. Rep. 838.

⁶ *Butterfield v. Byron* (1891), 153 Mass. 517, 27 N. E. 667, 25 Am. St. Rep. 654; *Angus v. Scully* (1900), 176 Mass. 357, 57 N. E. 674, 49 L. R. A. 562, 79 Am. St. Rep. 318; *Lord v. Wheeler* (1854), 1 Gray (Mass.) 282; *Clark v. Franklin* (1836), 27 Hun. (N. Y.) 557; *Hayes v. Gross* (1896), 9 App. Div. 12, 40 N. Y. S. 1098; *Goldfarb v. Cohen* (1917), 92 Conn. 277, 102 A. 649; *Dame v. Wood* (1908), 75 N. H. 38, 70 A. 1081; *Matthews Construction Co. v. Brady* (1928), 104 N. J. L. 438, 140 A. 433; *Carrell v. Bowersock* (1917), 100 Kan. 270, 164 P. 143, L. R. A. 1917D, 1006; *Keeling v. Schastey* (1912), 18 Cal. App. 764, 124 P. 445; *Acme Heating and Plumbing Co. v. Hirsch* (1931), 121 Neb. 134, 236 N. W. 137.

⁷ *Cook v. McCabe* (1881), 53 Wis. 250, 10 N. W. 507, 40 Am. Rep. 765.

⁸ *Haynes, Spencer, & Co. v. Second Baptist Church* (1882), 12 Mo. App. 536, *affd.* 88 Mo. 285; *Robb v. Parton* (1929), 178 Minn. 188, 226 N. W. 515; *Cleary v. Sohler* (1876), 120 Mass. 210.

tion the loss according to the contract; they hold that all rights are cut off by the unforeseen event. Thus, the contractor is not entitled to recover any payments not expressly due at that time, and the owner is not entitled to recover back any advance payments made.⁹ The underlying premise of these cases, that the loss must fall in accordance with the provisions of the contract, is logically unsound. The very reason for relieving the parties from responsibility for further performance is that they dealt on a mutual assumption of the continued existence of the building, or, in other words, that they did not contemplate and provide for this contingency. The view of most American courts has been that the fairest apportionment is made by allowing recovery for part performance; the various standards listed above represent the various methods of putting this policy into effect. The most satisfactory disposition, both from the standpoint of logic and reasonableness, seems to be that of allowing a quasi-contractual recovery for benefits conferred; recovery is thus granted for parts of the job put into permanent form and annexed to the owner's realty such that it was in position to operate to his sole benefit had not the accident intervened. No recovery is allowed for materials not yet incorporated.¹⁰ The Indiana Appellate Court adopted this latter standard in a case before it in 1903,¹¹ only to be overruled on transfer to the Supreme Court of the state, which adopted the English rule of no recovery.¹² This rule has been consistently followed in Indiana since that time.¹³

All of the various rulings heretofore discussed operate only when the parties have made no express apportionment of loss; the parties are free to provide for the contingency of accidental destruction in any way they see fit, if they are foresighted enough to do so. The court in the instant case, treating the Krause case¹⁴ as a binding authority, considered the effect of the provision that "no . . . destruction of the property shall release the buyer from his obligation hereunder;" the court construed property, as used in this provision, to refer only to the tanks fabricated, erected, completed, tested, and accepted, thus making the provision a nullity. It appears then, that under the rule followed in Indiana, the risk of loss incident to the destruction of a building after part performance of a contract to install machinery falls wholly on the contractor, and that loss can be shifted only by a clear and exact provision, incapable of ambiguity. There seems to be no reason for a policy so strongly unfavorable to the contractor.

D. M. C.

⁹ See cases cited *supra*, note 4.

¹⁰ *Carroll v. Bowersock* (1917), 100 Kan. 270, 164 P. 143, L. R. A. 1917D, 1006; *Mathews Construction Co. v. Brady* (1928), 104 N. J. L. 438, 140 A. 433.

¹¹ *Krause v. Board of Trustees of Crothersville* (Ind. App. 1903), 66 N. E. 1010.

¹² *Krause v. Board of Trustees of Crothersville* (1904), 162 Ind. 278, 70 N. E. 264, 65 L. R. A. 111, 102 Am. St. Rep. 203, 1 Ann. Cas. 460.

¹³ *Williams v. Butler* (1915), 58 Ind. App. 47, 105 N. E. 387; 107 N. E. 300; *Bruce v. Indianapolis Gas Co.* (1910), 46 Ind. App. 193, 92 N. E. 189.

¹⁴ Cited *supra*, note 12.